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10 UNITED STATES DISTRICT COURT  
11 WESTERN DISTRICT OF WASHINGTON  
12 AT TACOMA

12 JONATHAN W. McKINNEY,

13 Plaintiff,

14 v.

15 JOHN MILLS, *et al.*,

16 Defendants.

Case No. C08-5720 BHS/KLS

REPORT AND  
RECOMMENDATION

**Noted For:**  
**April 24, 2009**

17 This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned Magistrate Judge  
18 pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and (B) and Local MJR 3 and 4. The Court granted Plaintiff  
19 Jonathan McKinney leave to amend his proposed civil rights complaint to cure several deficiencies. After  
20 reviewing Plaintiff's proposed amended complaint, the Court again granted Mr. McKinney leave to amend or  
21 show cause why certain claims should not be dismissed. Mr. McKinney has failed to respond to the Court's  
22 order to amend or show cause. Accordingly, the undersigned recommends that Mr. McKinney's claims  
23 against the Pierce County Sheriff's Department be dismissed with prejudice prior to service for failure to  
24 state a claim and that this matter be re-referred to the undersigned for further proceedings.

25 **BACKGROUND**

26 Mr. McKinney was granted leave to proceed *in forma pauperis* on December 12, 2008. Dkt. # 3.  
27 The Court reviewed Plaintiff's proposed civil rights complaint (Dkt. # 4) and on December 12, 2008, the  
28 Court directed Mr. McKinney to file an amended complaint or show cause why this matter should not be

1 dismissed. Dkt. # 5. Mr. McKinney filed his First Amended Complaint on December 29, 2008. Dkt. # 6.  
2 After review, the Court found that Mr. McKinney had complied with the Court's Order, but that the First  
3 Amended Complaint contained an additional pleading deficiency. Mr. McKinney added the Pierce County  
4 Sheriff's Department as a defendant in the First Amended Complaint, but included no factual allegations  
5 describing how his civil rights were violated by any official policy or practice of the department. Dkt. # 7.

6 To state a Section 1983 claim, the plaintiff must allege facts showing a person acting under color  
7 of state law deprived the plaintiff of a right, privilege, or immunity secured by the Constitution. *Karim-*  
8 *Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 624 (9th Cir.1988). A municipality cannot be held  
9 liable under section 1983 unless the alleged deprivation of civil rights was caused by official municipal  
10 policy or practice. *Monell v. Department of Social Servs.*, 436 U.S. 658, 690-91 (1978); *Gillette v.*  
11 *Delmore*, 979 F.2d 1342, 1346 (9th Cir.1992) (per curiam), *pet. for cert. filed*, 62 U.S.L.W. 3165 (U.S.  
12 Aug. 5, 1993) (No. 93-315). Inadequate training can form the basis for municipal liability "only where  
13 the failure to train amounts to deliberate indifference to the rights of persons with whom the [municipal  
14 employees] come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Where liability is  
15 premised on a policy of inadequate training, "[p]roof of a single incident of unconstitutional activity is not  
16 sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused  
17 by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal  
18 policymaker." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985).

19 Section 1983 authorizes assertion of a claim for relief against a "person" who acted under color of  
20 state law. A suable § 1983 "person" encompasses state and local officials sued in their personal  
21 capacities, municipal entities, and municipal officials sued in an official capacity. *See also, Will v.*  
22 *Michigan Department of State Police*, 491 U.S. 58 (1989). Mr. McKinney named the Pierce County  
23 Sheriff's Department, but it is not a "person" under Section 1983. Mr. McKinney can only proceed  
24 against the Department if his allegations factually support that he was deprived of a constitutional right by  
25 a Department policy or inadequate training by the Department.

26 Mr. McKinney was granted leave to file a second amended complaint on or before March 13, 2009.  
27 Dkt. # 7. He has not complied with the deadline. It does not appear that this defect can be cured and  
28 dismissal of this claim prior to service is, therefore appropriate. *Franklin v. State of Oregon, State Welfare*

1 *Division*, 662 F.2d 1337 (9<sup>th</sup> Cir. 1981). Service of the First Amended Complaint may, however, proceed  
2 without the defective claim.

3 **CONCLUSION**

4 Mr. McKinney has failed to state a cause of action against the Pierce County Sheriff's Department  
5 under 42 U.S.C. § 1983. Accordingly, the undersigned recommends that Mr. McKinney's claims against  
6 the Pierce County Sheriff's Department should be **dismissed without prejudice**, and this case re-referred  
7 to the undersigned for further proceedings.

8 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the  
9 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R.  
10 Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal.  
11 *Thomas v Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the Clerk is  
12 directed to set the matter for consideration on **April 24, 2009**, as noted in the caption.

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14 DATED this 6th day of April, 2009.

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18 Karen L. Strombom  
19 United States Magistrate Judge  
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